

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Jesse Aron Ross,

Case No. 2:22-cv-00259-CDS-VCF

Plaintiff

V.

Calvin Johnson, et al.,

Order Renewing Preliminary Injunction & Appointing Counsel

Defendants

11 Plaintiff Jesse Aron Ross, who is incarcerated and proceeding pro se, brings this civil-
12 rights lawsuit based on the defendants' alleged denial of outdoor exercise time for him at High
13 Desert State Prison (HDSP). I previously determined that Ross is entitled to preliminary
14 injunctive relief, as Ross has demonstrated (1) a likelihood of success on the merits of his Eighth
15 Amendment claim, (2) a likelihood of irreparable harm resulting from a lack of outdoor exercise,
16 (3) that the balance of hardships favors him, and (4) that the injunction is in the public interest.
17 Order Granting Prelim. Inj., ECF No. 44. I ordered that the defendants must provide Ross with
18 "at least seven hours of access to outdoor exercise per week, subject to temporary limitations
19 when a genuine emergency arises." *Id.* at 12. The injunction went into effect on March 3, 2023,
20 but Ross filed various motions in April and May suggesting that the defendants were not
21 complying with it. See e.g., ECF Nos. 47, 62, 76. The defendants agree that Ross is not getting the
22 outdoor exercise time that I ordered, but they contend that staffing shortages at the prison have
23 resulted in an ongoing temporary emergency such that additional outdoor exercise time would
24 strain the prison's ability to maintain safety and security. Bean Decl., ECF No. 71-1.

I held a hearing on June 2, 2023, to hear additional testimony from the defendants as to why they are not complying with my injunction order. ECF No. 89. The representations of

1 defendant Brian Williams, Sr. (warden of HDSP) and nonparty Kristina Shea (deputy director of
 2 support services at the Nevada Department of Corrections) demonstrate that the staffing
 3 shortage at HDSP is not temporary and that ongoing constitutional violations—at least, in the
 4 form of inmates being denied outdoor exercise—are likely to continue.

5 **I. Order renewing preliminary injunction.**

6 “Preliminary injunctive relief shall automatically expire on the date that is 90 days after
 7 its entry, unless the court makes the findings required under subsection (a)(1) for the entry of
 8 prospective relief and makes the order final before the expiration of the 90-day period.” 18 U.S.C.
 9 § 3626(a)(2). My order granting the preliminary injunction went into effect on March 3, 2023,
 10 and I made the findings required by § 3626(a)(1) on the record at the June 2, 2023, hearing. ECF
 11 No. 89. For clarity, I reproduce those findings here in written form.

12 The Prison Litigation Reform Act (PLRA) sets the standards for when a court may grant
 13 prospective relief concerning prison conditions. It instructs that a “court shall not grant or
 14 approve any prospective relief unless the court finds that such relief is narrowly drawn, extends
 15 no further than necessary to correct the violation of the Federal right, and is the least intrusive
 16 means necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A). The
 17 PLRA “mean[s] just what it says—before granting prospective injunctive relief, the trial court
 18 must make the findings” the PLRA mandates. *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998).
 19 The Ninth Circuit has described them as “need-narrowness-intrusiveness” findings and reviews
 20 them for clear error. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010); *Brown v. Plata*,
 21 563 U.S. 493, 541 (2011).

22 A. Need

23 Upon finding (1) an ongoing violation of a plaintiff’s rights at the prison and (2) a
 24 common source of those violations, a district court can satisfy the “need” finding of the need-
 25 narrowness-intrusiveness test. See, e.g., *Armstrong v. Newsom*, 58 F.4th 1283, 1293–94 (9th Cir.
 26 2023). The undisputed evidence in the record thus far demonstrates ongoing constitutional

1 violations at HDSP. Ross's testimony and the exhibits he has produced demonstrate a lack of
2 constitutionally adequate outdoor exercise, and the declarations of prison officials describing
3 the reasons for the lack of outdoor time confirm Ross's allegations. Indeed, Warden Williams
4 testified at the recent hearing that under these circumstances, NDOC cannot comply with the
5 injunction and cannot even guarantee that Ross would have two hours of weekly outdoor
6 exercise time, let alone the injunction-mandated seven. HDSP is currently woefully
7 understaffed. It has 128 vacant positions (approximately a 26% vacancy rate), including 116
8 vacant correctional officer positions. ECF No. 71-1 at 3. The Associate Warden of HDSP admits
9 that while the department "has always struggled to fill vacancies, the past three years have been
10 exceptionally difficult." *Id.* Warden Williams reiterated this when he indicated that since he had
11 started at the NDOC in 2005, there were always staffing shortages, but that the COVID-19
12 pandemic exacerbated the challenges. These vacancies have resulted in modified program
13 operations at the prison, effectively curtailing many of the services available to inmates. ECF No.
14 89. Warden Williams testified that HDSP is frequently below minimum staffing levels (as
15 defined by the number of positions approved by the Nevada legislature to work at HDSP) and
16 that modified program operations occur "all of the time." *Id.* He estimated the ratio of
17 correctional officers to inmates at HDSP is currently one to 51. And these issues are not
18 temporary: Deputy Director Shea testified that the barriers to hiring and retaining more staff
19 will not disappear in the immediate future and that onboarding a new correctional officer can
20 take months, if not longer. *Id.*

21 But staffing limitations, which the defendants cite as justification for their wholesale
22 deprivation of Ross's Eighth Amendment rights, do not present an adequate basis to obviate the
23 need for injunctive relief. *See Shorter v. Baca*, 985 F.3d 1176, 1186 (9th Cir. 2018). "If the injury is the
24 result of . . . policies or practices pervading the whole system," system-wide relief is appropriate
25 even if only a "relatively small number of plaintiffs" are injured. *Schwarzenegger*, 622 F.3d at 1072–
26 73 (quoting *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001)). As already noted, this situation

1 is no longer temporary. There is thus a clear need for injunctive relief ordering the defendants to
 2 remedy the ongoing constitutional violations.

3 B. Narrowness

4 “[T]he constitution requires jail officials to provide outdoor recreation opportunities, or
 5 otherwise meaningful recreation, to prison inmates.” *Shorter*, 895 F.3d at 1185. The injunction
 6 issued in this case is meant to provide Ross with seven hours of outdoor exercise per week,
 7 which amounts to one hour of outdoor exercise per day. It is hard to envision a narrower
 8 injunction than the one I have already issued; my prior directive instructed the defendants to
 9 vindicate Ross’s constitutional right but did not place any significant burden on prison officials
 10 in how they might achieve that goal.

11 C. Intrusiveness

12 Under the PLRA, “[t]he overarching inquiry is ‘whether the same vindication of federal
 13 rights could have been achieved with less involvement by the court in directing the details’ of
 14 prison operations. *Armstrong v. Brown*, 768 F.3d 975, 983–84 (9th Cir. 2014) (quoting
 15 *Schwarzenegger*, 622 F.3d at 1071). A district court may, however, “provide specific instructions to
 16 the [s]tate without running afoul of the PLRA.” *Id.* at 986. In particular, when a district court
 17 “has previously tried to correct the deficiencies” in prison operations “through less intrusive
 18 means, and those attempts have failed, relief prescribing more specific mechanisms of
 19 compliance is appropriate.” *Id.* This court has tried—and failed—to rectify the ongoing
 20 constitutional violations at HDSP via less intrusive means. Ross brought this case after HDSP
 21 officials limited outdoor exercise “for up to [six] months straight at one point,” and between
 22 March 18, 2020, and January 1, 2021, he alleges he received “less than 20 hours of outdoor
 23 exercise.” Compl., ECF No. 1-1 at 4. During the pendency of this suit, Ross was denied outdoor
 24 exercise with similar frequency. I thus granted Ross preliminary injunctive relief and required
 25 HDSP officials to provide him with at least seven hours of access to outdoor exercise per week.
 26 Order, ECF No. 44. But that injunction has not seemed to impact the status quo, as Ross

1 received a mere nine hours of outdoor exercise during the entire month of March 2023 and only
 2 eight hours during the entire month of April 2023. ECF No. 76 at 2.

3 Because I find that the injunctive relief I previously ordered still comports with this
 4 Circuit's standards for the need, narrowness, and intrusiveness of injunctive relief under the
 5 PLRA, I hereby renew my prior injunction (ECF No. 44) for another ninety days.

6 **II. I sua sponte appoint counsel for Ross.**

7 The Constitution provides no right to appointment of counsel in a civil case unless an
 8 indigent litigant may lose his physical liberty if he loses the litigation. *Eusse v. Duarte*, 2013 WL
 9 5936366, at *1 (S.D. Cal. Nov. 1, 2013) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981)).
 10 Nonetheless, under federal law describing procedure for indigent persons, “[t]he court may
 11 request an attorney to represent any person unable to afford counsel” once he has been granted
 12 IFP status. 28 U.S.C. § 1915(e)(1). It may do so “only under ‘exceptional circumstances.’” *Terrell v.*
 13 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (discussing precursor to the same statute). “A finding
 14 of exceptional circumstances requires an evaluation of both ‘the likelihood of success on the
 15 merits and the ability of the petitioner to articulate his claims pro se in light of the complexity of
 16 the legal issues involved.’ Neither of these factors is dispositive and both must be viewed
 17 together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th
 18 Cir. 1986)).

19 I already found a likelihood of success on the merits of Ross’s lawsuit when I issued my
 20 order granting a preliminary injunction. The ex-post briefing from the defendants and the
 21 records produced by Ross only confirm that prior finding by demonstrating that Ross is, indeed,
 22 suffering from a lack of outdoor exercise time. While Ross has demonstrated a rather impressive
 23 ability to articulate his claims pro se thus far, I find that the complexity and scope of the legal
 24 issues involved and those that could arise in the natural course of this litigation warrant the
 25 appointment of counsel for Ross. So with both § 1915(e)(1) factors weighing in Ross’s favor, I
 26 find that sua sponte appointment of counsel is appropriate here.

1 III. Conclusion

2 IT IS THEREFORE ORDERED that the injunctive relief ordered in the March 3, 2023,
3 order (ECF No. 44) is RENEWED. The preliminary injunctive relief set forth in that order—
4 requiring that Ross be given seven hours of outdoor exercise time per week—is RENEWED for
5 an additional 75 days from June 2, 2023.

6 IT IS FURTHER ORDERED that this case be referred to the Pro Bono Program for
7 appointment of counsel for the purposes identified herein.

8 IT IS FURTHER ORDERED that the Clerk forward this order to the Pro Bono Liaison.

9 DATED: June 6, 2023



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11 Cristina D. Silva
12 United States District Judge

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